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IN THE

United States

Circuit Court of Appeals,

FOR THE NINTH CIRCUIT.

Marine Hardware Company, a Corporation,
Appellant,
vs.
Halfhill Packing Company, a Corporation,
Appellee,
Gasoline Launch "Mountaineer,"
Respondent.

APPELLANT'S OPENING BRIEF.

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This is an action *in rem* against the gasoline launch "Mountaineer."

The vessel was built at Tacoma, Washington, in the year 1920, under contract for the Halfhill Packing Company, a San Pedro corporation. She was completed in the early spring of 1920 and thereupon the Halfhill Packing Company sold her to one Mariani, while she was still at Tacoma, Washington, receiving a part of the purchase price in cash, the balance represented by a first mortgage on the vessel of seven thousand five hundred dollars ($7,500.00). Mariani, the new owner, documented her at Tacoma, fuel, stored and provisioned her, and brought her to San Pedro,

California, where he intended entering upon a fishing voyage in the waters of Southern California during the tuna season of 1920. Upon his arrival in San Pedro, and in contemplation of his intended fishing voyages, he purchased a large fishing net of the value of six thousand seven hundred three and 49/100 dollars ($6,703.49) from the Marine Hardware Company, the libellant herein. As soon as the net was delivered to the vessel, Mariani set out with her upon a fishing voyage.

The net not having been paid for, the Marine Hardware Company brought this action to foreclose their maritime lien against the vessel. Included in the libel were several items of materials sold for repairing the net and boat, but which are not material to this appeal [Tr. p. 2].

The Halfhill Packing Company filed a libel in intervention [Tr. p. 11] setting up their mortgage and asking that their rights be determined. They filed no answer to the libel of the Marine Hardware Company, though they ask that libellant be required to prove the allegations of their libel as best they may. The owner of the vessel filed no appearance, though he was present and testified [Tr. p. 82].

The matter was referred to a special master for a hearing and report, and during the hearing before him and upon the argument, the proctors for the Halfhill Packing Company contended that the net furnished by the Marine Hardware Company was in effect "materials and supplies which constituted a part of the original equipment of the vessel, and did not, there-

fore, give rise to a maritime lien." This contention having been sustained, libellant takes this appeal.

There were several other interveners, asserting maritime liens for groceries and other articles, but their various interests were determined satisfactorily to all parties, and the only question upon this appeal is whether or not the libellant, Marine Hardware Company, is entitled to a maritime lien.

In order to shorten the record on appeal, which was somewhat voluminous, a stipulation was entered into under Supreme Court admiralty rule No. 49, section IV. and rule No. .... of the Circuit Court of Appeals for the Ninth Circuit, specifying what matters were to be included in the record, and further expressly agreeing that "the record (as stipulated to) contains a full, true and correct statement of all the pleadings, orders, decrees, opinions and testimony in any way affecting the libel of the Marine Hardware Company, a corporation, and the defense made thereto by the Halfhill Packing Company, a corporation." This stipulation was signed by all the parties. [Tr. p. 118.]

In order for the libellant to make out a case for a maritime lien against the said vessel for furnishing supplies it is necessary for it to show, under the Act of 1910 and the amendments thereto, first, that supplies were ordered by the master or owner of the vessel, or someone by him or them authorized; second, that the supplies so furnished were necessary and proper to be used on the vessel in making its intended voyage or voyages; third, that they were delivered to and

used by and on the vessel. Those three things were conclusively shown by the testimony introduced on the part of the libellant [Tr. pp. 52 and 82], and the special master in his report specifically found that the libellant had proved those facts. The proof thereof *prima facially* established a maritime lien in favor of the libellant herein for the full amount claimed by its libel.

The defense urged by the Halfhill Packing Company is a special defense and while it was not pleaded, still the burden is on the claimant, or the person setting out such a defense, to prove it, and it must be proved by a preponderance of the evidence.

The evidence introduced by the Halfhill Packing Company in support of their defense is set forth in transcript, page 92. etc., it being the testimony of Mr. Mariani, who was master and owner of the gasoline launch "Mountaineer." He testified that the vessel was built at Tacoma, Washington, in the year 1920; he stated that it has been built for a purse seine boat; that a purse seine boat is somewhat different from the ordinary kind of a boat in that it has a different kind of a winch on it than the ordinary boat; that it has a big platform on it for a net and a big bored stern to hold the net; that after the vessel was built in Tacoma, Washington, he provisioned it and purchasing the necessary articles to enable him to cook and then left for San Pedro, California, for an intended fishing voyage; that he stopped at San Francisco, California, to have some slight repairs made on the engine, but that he did not do any fishing; that

some time after he arrived at San Pedro from Tacoma he purchased from the Marine Hardware Company the net for the furnishing of which this suit was brought, intending to immediately go on a fishing voyage; that as soon as he got the net he went out fishing. [Tr. pp. 92 to 99].

The greater part of that testimony was admitted over the objections of the libellant and is the only testimony introduced in the action and is the only testimony claimed by the Halfhill Packing Company to show that the net so purchased was part of the original construction and equipment of the vessel so as to bring it within the rule of the ship building contracts. The Marine Hardware Company did not know that the vessel had never fished before.

All of the things necessary to make the "Mountaineer" a purse seine vessel, to-wit: a turntable, a different kind of a winch and a broad stern were put aboard the vessel at Tacoma when she was built and where she was also documented and outfitted. When those things were put aboard the vessel she became a purse seine vessel, she was a completed thing capable of navigating on the sea in any character of a fishing voyage. In fact she came on her own power from Tacoma to San Pedro, a distance of some 1500 miles before the net was put aboard her. She was completely equipped for all navigation necessary to enable her to fish. Mariani did not testify that it was necessary for her to have a net to make her a purse seine vessel, but that she was such a vessel and was so completely equipped prior to her leaving Tacoma. The

net was used by the crew in fishing and was to be used with the vessel and was never at any time a part of the vessel.

The only case directly deciding the point in controversy is the case of

Hiram R. Dixon, 33 Fed., 297.

That case was decided by Judge Benedict in the District Court for the Eastern District of New York, December 15, 1887. It was a proceeding in *rem* to enforce against the steamer "Hiram R. Dixon," a lien for the price of certain fishing nets. The steamer was built at Mystic Bridge, Connecticut, in April, 1883; after having been launched she was towed to New York to receive her boilers and engines and for that purpose she remained in New York until July 4, 1883, where she was enrolled. After her enrollment she proceeded to Bristol, Rhode Island, and there received her outfit for a fishing voyage. As a part of her outfit for that voyage she received the nets in question and thereafter proceeded to sea to engage in the business of catching menhaden. The nets were made to order for the vessel upon the request of her owner during the time she was being built at Mystic Bridge and they were sent by the libellant to Bristol Ferry, where the "Hiram R. Dixon" picked them up. It was contended by the claimants that the contract was one for original equipment and therefore not maritime under the authority of People's Ferry Co. v. Burs, 20 How. 393.

In respect to that defense the court had this to say:

"The test of locality is now abandoned. The true test is the subject-matter. The subject-matter of this contract is the outfit of the vessel for a fishing voyage from Bristol Ferry, and the sole object sought to be attained by the contract was the accomplishment of such a voyage. Such a contract relates directly to navigation, business, and commerce on the sea, and is therefore maritime. The contract being maritime, and the nets being necessary for the vessel to enable her to perform an intended voyage, and being received on board at Bristol Ferry, where she was a foreign vessel, by the martime law a lien attached to the vessel enforceable in admiralty. So, also, in my opinion, an action in *personam* against the owner could have been maintained in admiralty upon the contract when performed.

"Again, it is contended that the contract was one for original equipment, and therefore not maritime. The case of the Thomas Jefferson (People's Ferry Co. v. Beers), is cited as authority. In the case of the Thomas Jefferson, a contract for building the hull of a ship was held not to be a maritime contract. The only reason given is that the contract was made on land, to be performed on land, and had no reference to a voyage, to be performed. Considering the time when it was made, 1857, this decision is to some extent explained by the statement in the opinion that 'the question presented involves a contest between the state and federal government.' In the subsequent case of The Capitol (Roach v. Chapman), 22 How. 129, argued by Judah P. Benjamin, in 1859, a contract for building a ship,

> or supplying engines, timber or other materials for her construction, was held not maritime upon the grounds stated in the case of the Thomas Jefferson, that the contract was a contract for construction made on land, and had no reference to a voyage to be performed. These decisions are still law in cases for constructing a ship, made without reference to a voyage to be performed. 'The effect of these decisions is not to be extended by implication to other cases.' Insurance Co. v. Dunham, 11 Wall. 28. They do not control this case, because the contract for these nets did have a reference to a voyage to be performed, and besides was not a construction contract. The nets were to be used on a then contemplated voyage, and the sole object of the contract sued on was to enable that voyage to be performed. When they were received by the vessel she was already constructed and had made a voyage from New York to Bristol Ferry."

The facts in the instance case are parallel to the case "Hiram R. Dixon"; there the vessel was built to be a fishing vessel, particularly to fish for menhaden, and in order to be able to fish for menhaden it was necessary for her to have a net, just as it is necessary for a purse seine boat, which is of the same general type of a vessel as a trawler, to have a net in order to fish for tuna; she was built and completed with her engines, and the necessary construction and equipment in New York, as this vessel was built in Tacoma. After being fully equipped as a vessel so that she could fish, she proceeded to Bristol Ferry in the state of Rhode Island, just as the "Moun-

taineer" navigated from Tacoma to San Pedro. At Bristol Ferry she procured the nets in question and thereupon proceeded upon her fishing voyage. She was a fishing boat and, of course, it was contemplated that the net should be used for more than one voyage, for it necessarily must have been used until it should be worn out, and it is a matter of common knowledge that a fishing net will last for approximately two seasons of fishing, at least for more than one catch of fish.

The reasoning in the case of the Hiram R. Dixon exactly coincides with the statements made by the Supreme Court in every single case they have decided subsequent to the case of Hiram R. Dixon. It, the Hiram R. Dixon, has not been specifically or by implication overruled by any case decided by the Supreme Court of the United States, nor has it been specifically overruled by any case decided by any Circuit Court of Appeals or any District Court decision, so far as we have been able to determine.

The case relied upon by the court below in support of its judgment is the case of

> Thames Tow Boat Company v. Schooner Frances McDonald, 254 U. S., 244.

In that case the Palmer Shipbuilding Company under a definite contract began the building of the schooner at Groton, Connectitcut, and thereafter launched the hull. Subsequently it found it was unable to proceed further, and thereupon the appellant, Thames Tow Boat Company, agreed with the owner to complete the work, and for that purpose the hull

was towed to its yard at New London. When the appellee received the schooner she was manifestly incomplete, her masts were not in the bolts and beams and gaff were lying on the dock and she was not "in condition to carry on any service." The appellants relied upon certain cases decided by the United States District Court of Oregon and Washington, and the case of Tucker v. Allexandroff, 183 U. S. 424.

The Supreme Court in its opinion specifically overruled the Oregon and Washington cases and held that the fact that the vessel is launched does not make it a completed thing, but that she must be able to carry on the navigation intended before she becomes a complete ship. They cite several cases which we will hereinafter review.

The question involved in that case is whether or not there is any difference between a ship building contract and one made for work and material to complete the *construction* of a vessel after she has been launched and is water born. There were several decisions of the District Court holding that a distinction should be made between the two kinds of contracts, and that any contract concerning the hull of a ship after she was water borne was a maritime contract. The court simply decided that there was no such distinction and held that any work and material necessary to consumate a partial construction is not a maritime contract. The court says:

> "Notwithstanding possible and once not inappropriate criticism, the doctrine is now firmly established that contracts to construct entirely

> new ships are non-maritime because not nearly enough related to any rights and duties pertaining to commerce and navigation. It is said that in no proper sense can they be regarded as directly and immediately connected with navigation or commerce by water. Edwards v. Elliott, 21 Wall, 532, 554, 555, 22 L. Ed. 487. The William Windom (D. C.) 73 Fed. 496. Pacific Surety Co. v. Leatham & S. Tow. & Wreck. Co., 151 Fed. 440, 245, 80 C. C. A. 670. And we think the same reasons which exclude such contracts from admiralty jurisdiction likewise apply to agreements made after the hull is in the water, for the work and material necessary to *consummate a partial construction* and bring the vessel into condition to function as intended."

From the above quotation it is apparent that the Supreme Court stays by the principal announced in the "Hiram R. Dixon" *Supra,* and holds that any contract made without reference to a voyage and for the construction of a vessel is not a maritime contract; it, of course, follows that a contract made to equip a vessel to carry out an intended voyage or voyages is a maritime contract, and any contract having to do with the vessel after the construction of her has been completed so as to bring her into condition to function as intended is a maritime contract and gives rise to a maritime lien. In the instant case we have the construction entirely at Tacoma, Washington, and a contract made at San Pedro, California, for furnishing of a net for the use of the vessel in a fishing voyage to be undertaken, and which was immediately undertaken after the furnishing of the net.

In a later case decided by the Supreme Court, February 27, 1922, entitled

The Jack o' Lantern, 42 Supreme Court, Reporter, 243.

The Supreme Court limited the decision theretofore made by them in the case of The Thames Tow Boat Company v. the "Frances McDonald," and in that case impliedly overruled some of the decisions cited as authority by the Supreme Court by their former decision. The decision had not been reported at the time of the special master's report.

The "Jack o' Lantern" had been a car barge and was converted by the libellant into a pleasure boat by installing machinery so that she was self-propelling, putting in a dance floor and making other changes necessary to make her a pleasure ferry. The court says: "We are not disposed to enlarge the compass of the rule approved in Thames Tow Boat Company v. the 'Frances McDonald,' under which contracts for the *construction* of entirely new ships are classed as non-maritime, or to apply it to agreements of uncertain intendment—reasonable doubts concerning the latter should be resolved in favor of admiralty jurisdiction."

The two other decisions of the Supreme Court relied upon by the lower court in sustaining its judgment are those of

The Winnebago, 205 U. S. 354, and

North Pacific Steamship Company v. Hall, 249 U. S. 127.

In the Winnebago the Supreme Court does not specifically say what materials were furnished that constituted original construction, nor do they say how far the vessel was in her construction at the time the materials and supplies were furnished. However, the Supreme Court's decision affirmed a decision of the Circuit Court of Appeals reported in 141 Fed. 945, and the Circuit Court of Appeals in its opinion makes the following statement:

> "As has been stated the vessel was launched March 21, 1903. Some of the materials for her *construction* were furnished in the interim; and it is contended that for these there could be no recovery * * *. A ship launched, but still in the course of *construction,* does not become subject to maritime law, because she rests in the water rather than on land, and does not become so until she is put into use as an agency of commerce, or, at least, until she is fitted for that purpose; and she ceases to possess a maritime character when she is permanently withdrawn from such service."

The "Winnebago" was an appeal from a decision of a state court, appellants claiming that the matters adjudged to be a lien by the said court were within the admiralty jurisdiction of the United States Court.

In the case of the North Pacific Steamship Company v. Hall, the court holds that the true basis for distinction between maritime and non-maritime contracts is that contracts for construction are about wood and steel and not about ships, and they are not of and concerning ships until the wood and steel are wrought together and become a ship; until in other words, she

becomes a complete ship capable of all navigation for her intended use and is ready for service.

From these decisions it is apparent that the Supreme Court has taken the stand that because a ship is launched and water borne does not make her a completed ship, but that it is evidenciary only, and may be overcome by proof that she was not sufficiently constructed to carry on the purpose intended and that any contract or any materials or supplies furnished in order to fit a ship out for a particular voyage or voyages is maritime in its nature and does constitute a maritime lien against the ship.

The case of the "Hiram R. Dixon," heretofore cited, was not cited by the Supreme Court in the "Frances McDonald" with disapproval because of the fact that it was approved and the doctrine therein set forth is the same as the doctrine of the Supreme Court. In the "Frances McDonald" it is not cited with approval because it is not material to the particular case under consideration. It has nothing to do with furnishing of supplies for the *construction* of a vessel.

The other cases relied upon by the lower court in the making of its decision are the same as those cited by the Supreme Court in the schooner "Frances McDonald," *supra*. They are Count deLesseps, 17 Fed. 460; Glenmont, 32 Fed. 703, and 34 Fed. 402; Paradox, 61 Fed. 860; McMaster v. One Dredge, 95 Fed. 832; The United Shores, 193 Fed. 552. They were all cited as authority for the proposition that there was no distinction between contracts made for *con-*

struction after the ship was in the water and those made before she was launched.

In Count deLesseps the vessel had been partially constructed at New Jersey, and from there towed to Philadelphia where she was completed. Counsel for the libellant contended that the materials furnished by them were not contemplated by the original agreement for construction, there being no question but that the materials furnished were a part of the vessel. The court simply held that the materials and supplies furnished by the libellant were in fact contemplated by the original construction agreement and they were therefore a ship building contract and within the rule.

In the Glenmont, 32 Fed. 703, a District Court decision, the court refused to allow claims for fuel, food, bedding and similar articles on the ground that they were a part of the original construction. However, the Circuit Court of Appeals in the same case reported in 34 Fed. 402, which is also cited in the case of the "Frances McDonald" refused to acquiesce in the decision of the lower court regarding those particular items and affirms the judgment on a ground not considered by the District Court.

We believe that the Supreme Court approved the principle laid down in that decision rather than the particular items that had been excluded.

In the Paradox, 61 Fed. 860, the libellant finished the *construction* of a vessel, which the builder of the hull had left undone. It was clearly a part of the *construction* of the vessel just as much as the building

of the hull, and the court simply decided that because a ship may be water borne does not mean that all contracts concerning her gave rise to a maritime cause of action.

In the McMaster v. One Dredge, the court had under consideration the conversion of a scow into a dredge. There they held that a change may be so great as to be in effect a building of a new thing and not a repair of the old, and therefore it was a ship building contract. The effect of that decision is somewhat weakened by the case of the "Jack o' Lantern," *supra.*

The decision of the United Shores was placed on the ground that the vessel could not navigate without the life boats and rafts and that until she could navigate she was not a completed thing. The United Shores was built as a passenger vessel and under the laws of the United States she could not navigate without having certain life boats, life rafts and kindred articles aboard, and therefore the court held that she could not be a completed vessel capable of all navigation intended. In the instant case the "Mountaineer" was completely and entirely fitted as a purse seine and was able to navigate as such and was able to go anywhere that it would be necessary for a vessel to go in order for her to fish for tuna, or any other fish. The net furnished by the libellant herein was furnished to her in contemplation of certain fishing voyages which she was about to undertake. It was not furnished for the purpose of completing her as a vessel so that she could navigate.

The last case cited by the Supreme Court in the schooner "Frances McDonald" is the case of "Dredge A," reported in 217 Fed, at page 617. The decision in that case was by Judge Connor of the District Court for the Eastern District of North Carolina, decided October 5th, 1914. The facts were as follows:

One Edmund H. Mitchell having a dredge contract, procured an old dredge and took the same to a shipbuilding company and ordered them to convert it into a dredge suitable for dredging operations he was about to undertake. The shipbuilding company was located at Philadelphia in Pennsylvania, and the work that Mitchell had contracted with the Government to do was to be done at the ports of Oriental, Morehead City and Beaufort in North Carolina.

Pursuant to the contract, Howard S. Roberts, the shipbuilder, caused the old hull to be brought from New York to his yards at Philadelphia and there commenced to fit her out as a dredge. During the work necessary to complete her as a dredge, various persons furnished labor, materials and other things necessary to fit her out as a suction dredge, both while she was on the shore and after she had been launched.

After the dredge had been completed, she proceeded to North Carolina, and started in on her dredging operations. While she was there, before and after engaging in the work, various other parties furnished supplies to enable her to proceed with the work contemplated.

The dredge was completed and turned over to Mitchell at Philadelphia on May 11th, 1911, and she was thereupon towed to Beaufort, N. C., where she started in the work of dredging.

The court divided the claims into two classes, and allowing those based upon supplies furnished after May 11th, 1911, and disallowing those originally prior to May 11th, 1911. The court said:

> "Careful consideration, in the light of the principles of maritime law, as announced and enforced by the authorities cited, leads me to the conclusion that the claims originating prior to May 11, 1911, and while the dredge was in the shipyard at Philadelphia, are for *construction,* and not repairs; that the cash and articles furnished between those dates were furnished for *construction*, and not maritime liens. I am also of the opinion that they were furnished upon the credit of Edmund H. Mitchell. The claim for the articles, cash, and materials furnished and labor performed for the dredge after May 11, 1911, and while she was engaged in the work of dredging in Beaufort Harbor, are for repairs *and necessary supplies*, clearly within the admiralty jurisdiction, and constitute maritime liens on the dredge."

Some of the supplies furnished by various parties after May 11th, 1911, were of a similar nature to those furnished prior to that date. The court specifically finds, in the claim of S. P. Handcock (one of the claims which were allowed) that the items furnished "were necessary and essential to enable the boat to begin and continue the operation of its dredging in

the harbor of Beaufort * * *." Among the supplies furnished by Handcock were certain pontoons, which were the first pontoons furnished to the dredge, and which were absolutely essential for dredging operations."

The distinction made by the Supreme Court in all of the cases cited has been whether or not, first, there was a contract for the construction of a ship, that is for supplying her with engines, timber or other similar materials, or, second, that it was a contract made on land to be performed on land and had no reference to a voyage to be performed. Here we have a contract made for furnishing a net to the vessel. A net is not materials used for the construction of a vessel. It is not any part of a vessel, and it does not help her in any way to move or navigate. It is not like a compass or tiller line or check line, rudder, masts or sails, for without them she could not be a completed thing. The contract for the net was not one to be performed on land without any reference to any voyage, but was made specifically with the understanding that it was to be immediately used by the vessel in a voyage to be thereafter undertaken, and the master and owner testified that immediately upon receiving the net he started upon a fishing voyage, and so far as we know, the vessel continued to fish until the time that she was libelled, with the same net aboard furnished by the libellant herein. [Tr. p. 99.]

After the decision of the Supreme Court in the case of People's Ferry Company v. Beers, which defi-

nitely settles for all time the proposition that contracts for construction of ships are not maritime and do not give rise to a maritime lien upon the vessel built, there arose a controversy as to when a vessel was to be deemed to be completely *constructed*. It had always been a rule of law that as soon as a vessel was launched and water borne she became subject to the jurisdiction of admiralty in so far as torts were concerned. The test of jurisdiction in tort cases has always been the place in which the tort occurred. It was therefore contended that any contracts made of or concerning a ship after she was water borne gave rise to a maritime lien, regardless of whether the contracts were for the construction of a ship or not.

On the other hand it was contended that the true test in contract actions was whether or not they were related to commerce and navigation, and since the Supreme Court had decided that construction contracts were non-maritime and that it made no difference whether a construction contract was made after a ship was launched or not, and that it made no difference whether the construction was performed while the ship was water borne or before she was launched. Prior to the cases of the "Frances McDonald" there had been conflicting authority. The Supreme Court in that case settled that controversy and held that any work and material necessary to consummate a partial construction was non-maritime.

In the instant case we have a vessel completely constructed in Washington. She came under her own

power to San Pedro where she expected to go immediately on a fishing voyage. She needed a net to undertake that fishing voyage. In contemplation of such a fishing voyage she purchased the net from the Marine Hardware Company, libellant herein. Immediately after receiving the net she went out upon her intended voyage. A net certainly is not a part of the construction of a vessel. It is not necessary to enable her to navigate as a fishing vessel. The contracting question here was made in reference to a particular voyage or voyages about to be undertaken by the gasoline launch "Mountaineer." It certainly cannot be said that the contract was not nearly enough related to commerce in order to make it a maritime lien.

The Supreme Court in its decision requires that a contract in order to be non-maritime must be both for *construction and* necessary to bring the vessel into a condition to function as intended. All of the decisions regarding original equipment go off upon the point either that the original equipment furnished was a part of the original ship building contract, or that the particular vessel in question could not navigate for the purpose intended without that equipment. Here no such question has arisen. The original ship building contract is in evidence and the only testimony is that the boat was fully completed and capable of all navigation when she left Tacoma, Washington.

The appellee, Halfhill Packing Company, did not contend that we had not fully established our right to a maritime lien for the sum of six thousand seven

hundred eighty-six and 14/100 dollars ($6786.14) less payments made of two thousand dollars ($2000.00), except for their special defense. The commissioner [Tr. p. 20] found that to be a fact.

We submit under the evidence that the libellant, Marine Hardware Company, is entitled to a maritime lien against the gasoline launch "Mountaineer" in the sum of four thousand seven hundred three and 49/100 dollars ($4703.49) and is entitled to have that lien enforced by a sale of the vessel.

Respectfully submitted,

LOUCKS & PHISTER,

Proctors for Appellant.